

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

CHRISTOPHER A. JONES,)	3:00-CV-0509-ECR-VPC
)	
Plaintiff,)	
)	
vs.)	<u>ORDER</u>
)	
BECKI LOPEZ,)	
)	
Defendant.)	
)	
)	

On February 20, 2007, the Magistrate Judge entered a Report and Recommendation (#266) recommending that Defendant's motion for summary judgment (#238) be granted with respect to count one of Plaintiff's Fourth Amended Complaint (#119) and denied with respect to count three.¹ Plaintiff filed Objections (#271) to the Magistrate Judge's Report and Recommendation on March 14, 2007. With the following additional comments, the Magistrate Judge's report is **ADOPTED**.

In count one, Plaintiff alleges that his legal papers were destroyed when he refused to comply with Defendant Lopez' orders to

¹There are only two counts. Count two was previously dismissed (#95, #102) and Plaintiff has retained his prior numbering in his Fourth Amended Complaint.

1 move his property. Plaintiff contends that these orders violated
2 his doctor's orders and that the destruction of his legal papers
3 caused him injury in his habeas proceedings in both state and
4 federal court. He further contends that the destruction of his
5 property constituted a deprivation of due process, unconstitutional
6 retaliation for exercising his Eighth Amendment rights, and
7 unconstitutional obstruction of his right to access the courts. In
8 Plaintiff's Fourth Amended Complaint he cites the First and
9 Fourteenth Amendment, rather than the Eighth Amendment.

10 We agree with the Magistrate Judge that the allegations are
11 serious and we also agree that there are genuine issues of material
12 fact regarding whether Plaintiff's legal materials were destroyed.
13 Under the rule of Hudson v. Palmer, 468 U.S. 517 (1984), however,
14 Plaintiff does not have an actionable Fourteenth Amendment claim
15 unless the State of Nevada does not provide "an adequate
16 postdeprivation remedy" for prisoners in Plaintiff's circumstances.
17 Id. at 536; see Emil v. Crawford, 125 Fed.Appx. 112 (9th Cir. 2005)
18 (applying the rule of Hudson v. Palmer to Nevada).

19 Plaintiff argues that Defendant Lopez retaliated against him
20 "for refusing to comply with her unreasonable order to violate a
21 trained medical professional's preventative / protective medical
22 restrictions," and that the destruction of his property violated
23 his Eighth Amendment rights. (P.'s Opp. To Def.'s Mot. for Summ.
24 J., #251-1, at 25). Plaintiff asserts that he "had a right to
25 refuse to engage in [medically] prohibited activities that could
26 injure him or cause him unnecessary pain." (Id. at 26.) Although
27 circumstances might arise where a prisoner could justifiably refuse
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1 to comply with an outrageous order from a prison guard, the Eighth
2 Amendment does not create an affirmative constitutional right to
3 refuse orders. Even if we were to recognize such a right,
4 Defendant Lopez would be entitled to summary judgment on the basis
5 of qualified immunity.

6 With respect to Plaintiff's claim in count one that he has
7 unconstitutionally been deprived of access to the courts, Plaintiff
8 objects that the Magistrate Judge has found that the Nevada Supreme
9 Court considered his Amended Opening Brief in his habeas appeal,
10 whereas a different federal judge in this district previously found
11 the opposite in requiring Plaintiff to exhaust his state habeas
12 claims. Plaintiff argues that this discrepancy creates a genuine
13 issue of material fact. We disagree, and the Magistrate Judge
14 squarely addressed this issue, noting that "Rather than notifying
15 this court [i.e., the federal district court judge considering
16 Plaintiff's federal habeas petition] that the Nevada Supreme Court
17 had indeed considered plaintiff's amended opening brief on his
18 *petition for rehearing*, plaintiff elected dismiss the entire action
19 and return to state court to exhaust." (Report and Recommendation
20 at 18 (#266) (emphasis added).) In light of the denial of the
21 petition for rehearing, the fact that the prior Amended Opening
22 Brief was filed very shortly before the Nevada Supreme Court's
23 decision in his state habeas appeal does not create a genuine issue
24 of material fact as to whether his filing was considered.
25 Moreover, even if the Amended Opening Brief was not considered
26 Plaintiff's allegation that he was injured remains complete
27 speculation.

1 There is no evidence before this Court that would establish
2 that the alleged destruction of Plaintiff's legal documents either
3 impaired his right to file his habeas claim or prevented the Nevada
4 Supreme Court from reviewing it. Plaintiff has failed to
5 demonstrate evidence of any actual injury.

6 In count three Plaintiff alleges that Lopez retaliated against
7 him for filing grievances by submitting false disciplinary reports.
8 Defendant argues that the "some evidence" standard is applicable to
9 Plaintiff's claim that the disciplinary charges were retaliatory.
10 Ninth Circuit precedent makes it quite clear that the "some
11 evidence" standard does not apply to Plaintiff's claim. Hines v.
12 Gomez, 108 F.3d 265, 268 (9th Cir. 1997). Genuine issues of
13 material fact preclude summary judgment with respect to count
14 three.

15 Plaintiff's pro se complaint leaves some ambiguity as to
16 whether he intended to plead First Amendment retaliation with
17 respect to the destruction of his property in count one or in count
18 three. The Magistrate Judge, in recommending granting summary
19 judgment on count one, nevertheless considered the facts of count
20 one as they were incorporated by reference into count three. We
21 agree with the Magistrate Judge that summary judgment cannot be
22 granted on this record with respect to Plaintiff's claim that the
23 destruction of his property was retaliation for Plaintiff's prior
24 filing of grievances in violation of the First Amendment.

25 Defendant's motion (#238) for summary judgment is **GRANTED** with
26 respect to count one of Plaintiff's complaint without prejudice to
27 Plaintiff pursuing state law remedies for the deprivation of his
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1 property. Defendant's motion (#238) for summary judgment is **DENIED**
2 with respect to count three of Plaintiff's complaint.

3 DATED: This 26th day of March, 2007

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6 UNITED STATES DISTRICT JUDGE
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